IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1894

FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER AND SEWER UTILITIES, THE LAKE WORTH UTILITY AUTHORITY, THE UTILITIES COMMISSION OF NEW SMYRNA BEACH, THE ORLANDO UTILITIES COMMISSION, THE SEBRING UTILITIES COMMISSION, and the CITIES OF ALACHUA, BARTOW, FORT MEADE, KEY WEST, LAKE HELEN, MOUNT DORA, NEWBERRY, ST. CLOUD AND TALLAHASSEE, FLORIDA, and the FLORIDA MUNICIPAL UTILITIES ASSOCIATION

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA

Respondents,

and

FLORIDA POWER & LIGHT COMPANY

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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Florida Power & Light Company (FPL), an intervenor in support of respondent Nuclear Regulatory Commission (Commission or NRC), below, submits this brief in opposition to the Petition for Writ of Certiorari[1] to review the judgment entered in this case on March 23, 1979.

STATUTES INVOLVED

FPL does not adopt Florida Cities' characterization of Section 186 of the Atomic Energy Act of 1954 (Act), 42 U.S.C. §2236, as the "principle [*sic*] statute involved" (Pet., 4). The decision below was also based on Sections 102b and 105 of the Act, 42 U.S.C. § 2132(b), §2135, which are set forth in the Appendix to the Petition at A-85 and A-88 through A-91, respectively.

[1] Citations to the Petition are designated as "Pet.," followed by the page number. The Petition contains an Appendix, which consists of the text of relevant decisions below and applicable statutes. The Appendix is numbered consecutively, with each page number preceeded by an "A-". This Appendix begins with the D.C. Circuit's decision below, which, as of the filing date, has not been published. Since the slip opinion is numbered the same as the version appearing in the Appendix (with the exception of the "A-") citations to the Court of Appeals decision will reference only the Appendix.

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the NRC's determination that the NRC could not invoke Section 186a of the Act to apply the antitrust review standards of Section 105c to earlier issued licenses, which, because of express Congressional exemption, were not subject to the antitrust review provisions of Section 105c when the applications were originally filed?

STATEMENT OF THE CASE

Respondent FPL is an investor-owned public utility which generates, transmits, and distributes electricity to its customers within the state of Florida. FPL's resources for the generation of electricity include three nuclear plants which are licensed to operate by the NRC.

Petitioners, Florida Cities,[2] seek review of a decision by the Court of Appeals for the D.C. Circuit upholding the NRC's denial of Florida Cities' requests to initiate antitrust proceedings to modify, suspend, or revoke the operating licenses that FPL holds for its currently operating nuclear plants.

All of the authorizations for construction of these operating plants were issued pursuant to Section 104b of the Act, 42 U.S.C. §2134(b). As it read prior to amendment in 1970, that section authorized issuance of licenses for "research and development" facilities, as contrasted with Section 103, 42 U.S.C. §2133(a), which applies to licenses for "commercial" facilities. One difference between the two provisions is that an

[2] The individual Florida Cities ("Cities") are listed at Pet., 5, n.2.

antitrust review, pursuant to Section 105c, must precede issuance of a commercial (Section 103) license, while no such review attends issuance of a "research and development" (Section 104b) license. Prior to 1970, the Act required that licenses for power reactors be issued under Section 104b until the Commission made a finding that nuclear generating facilities had "practical value."[3] The Commission's failure to make the "practical value" finding, and its resulting practice of continuing to license power reactors under Section 104b without antitrust review, was challenged unsuccessfully in *Cities of Statesville, et al.* v. *Atomic Energy Commission*, 441 F.2d 962 (D.C. Cir. 1969) (en banc).

Congress in 1970 amended the Act[4] to eliminate the requirement for a finding of practical value and to require that, in the future, licenses for power reactors be issued under Section 103 after an antitrust review. However, the 1970 amendments dealt differently with construction permits which had already been issued under Section 104b, including FPL's three plants in issue here.

Licensing of nuclear facilities is a two step process under the Act. First, the Commission issues a construction permit, and, later, after it finds, among other things, that the facility has been properly constructed and can be operated consistent with the public safety, the Commission issues an operating

[3] Section 102 of the Act, 42 U.S.C. §2132, substantially amended in 1970 as described at p.5, *infra*.

[4] P.L. 91-560, 84 Stat. 1473.

license.[5] The *Statesville* court had suggested that, once the "practical value" hurdle was removed, construction permits issued under Section 104b would be converted to "commercial" (Section 103) operating licenses, and that an antitrust review in connection with issuance of those operating licenses would be appropriate under the Act as it stood in 1969. In 1970, Congress focused specifically upon this suggestion and decided not to require any such conversion, but to permit the holders of construction permits under Section 104b to receive operating licenses under the same section without any antitrust review under Section 105c.[6] FPL's three operating plants all received operating licenses under Section 104b.[7]

On August 6, 1976, some three to four years after issuance of the operating licenses for the Turkey Point units and five months after issuance of the St. Lucie Plant, Unit No. 1 operating license, the Cities first made antitrust allegations to the NRC in the form of a petition for leave to intervene and request for an antitrust hearing. Cities requested, principally on the

[5] *See*, Sections 103d and 185 of the Act, 42 U.S.C. §§2133(d), 2235. *See also Power Reactor Development Co.* v. *International Union*, 367 U.S. 396 (1961).

[6] See Section 102b, 42 U.S.C. §2132(b). However, antitrust review of Section 104b operating licenses is permitted in certain cases where intervention on antitrust grounds had been sought prior to the enactment of the 1970 Amendments. Act, Section 105c (3), 42 U.S.C. § 2135(c)(3). This exception is not pertinent here.

[7] Turkey Point Unit No. 3 received its license on July 19, 1972; Turkey Point Unit No. 4 was licensed on April 10, 1973; St. Lucie Unit No. 1 was licensed on March 1, 1976.

basis of Section 186a of the Act,[8] that the NRC commence a proceeding to determine whether the operating licenses issued under section 104b of the Act for FPL's operating plants should be "revoked or modified" on the antitrust grounds.[9] FPL has categorically denied the allegations that a situation inconsistent with the antitrust law exists with respect to any of FPL's proposed or operating nuclear plants. In addition, FPL argued with respect to the operating plants which are in issue here that the NRC lacks jurisdiction to convene an antitrust proceeding because: (1) the NRC's antitrust review authority exists in the context of its licensing proceedings, and does not extend to convening proceedings to enforce the antitrust laws against holders of outstanding licenses; and (2) even if the NRC possesses continuing antitrust review authority, such authority cannot be applied to licenses which Congress has expressly exempted from the Act's antitrust review provisions.

The NRC denied the Cities' request to convene antitrust proceedings with respect to FPL's operating plants. The operative decisions are an opinion of the

[8] Section 186a is a general provision of the Act, which was part of the original 1954 enactment. It provides, in pertinent part, that the NRC may revoke a license "... because of conditions ... which would warrant the commission to refuse to grant a license on an original application...."

[9] In addition, Cities' August 6, 1976, filing requested late intervention and an antitrust hearing with respect to FPL's St. Lucie Plant, Unit No. 2, which application was filed under Section 103 of the Act. The Commission granted the request, which was not in issue before the D.C. Circuit. That matter is separately pending before the Commission in a proceeding entitled *In re Florida Power & Light Company* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A. The Cities' substantive antitrust allegations are being considered in an antitrust hearing in that docket.

NRC's Appeal Board in ALAB-428, 6 NRC 221 (1977) (Pet., A-41)[10] and a letter by the NRC's Director of Nuclear Reactor Regulation, dated September 9, 1977, denying, in reliance on ALAB-428, the Cities' request for issuance of an order requiring FPL to show cause why its licenses for the operating plants should not be revoked or modified (Pet., A-39).

In ALAB-428, the Appeal Board concluded, on two independent grounds, that the Commission lacked jurisdiction to initiate the requested antitrust proceedings. It found, based on the Commission's earlier *South Texas* decision,[11] that NRC licensing authority over antitrust matters "does not extend over the full 40-year term of the operating license but ends at its inception" (Pet., A-46). The second, independent ground for the Appeal Board's conclusion was that the antitrust review provisions of Section 105c do not apply to licenses, such as are involved here, issued pursuant to Section 104b of the Act (Pet., A-44-45). The Appeal Board emphasized that when the 1970 amendments were enacted, "Congress had considered this class [of] reactors ... and elected to exclude them from antitrust review under section 105c (except in limited circumstances not present in this case)" (Pet., A-45). The Appeal Board said:

> Even if we assume *arguendo* that Section 186a means what Florida Cities assert it does, their

[10] The Commission declined to review the decision of its Appeal Board, CLI-77-26, 6 NRC 538 (1977) (Pet., A-49).

[11] *Houston Lighting & Power Company*, (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977), *appeal dismissed sub nom. Central Power and Light Company* v. *NRC*, No. 77-1654 (D.C. Cir. June 12, 1978) (Pet., A-51) (Hereafter "*South Texas*").

> cause is not advanced. The nuclear power plants in question were licensed under Section 104b. As we have already explained, by Congressional mandate antitrust considerations were not grounds for refusing operating licenses to such "research and development" facilities.

Id.

Cities petitioned the D.C. Circuit for review of the Commission's order declining to review ALAB-428 (No. 77-2101) and for review of the Director's denial of the request to initiate a show cause proceeding (No. 77-1925).

In an opinion by Circuit Judge McGowan in which Chief Judge Wright and Circuit Judge Wilkey joined, the D.C. Circuit affirmed the Appeal Board's holding that Section 186a of the Act does not authorize post-licensing antitrust review of the Section 104b operating licenses in issue. The court deliberately declined to reach the alternative ground for the Appeal Board's decision, that Section 186a does not vest the NRC with continuing antitrust authority over operating licenses since this authority is set forth exclusively in Section 105 of the Act.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision below concerns the NRC's construction of a statutory grandfather clause which exempts a certain class of older reactor licenses from a special antitrust review procedure. No question of antitrust law or policy is raised. The Court of Appeals carefully avoided reaching any question of the extent of the NRC's antitrust review authority over licenses not covered by the grandfather clause, which include the

licenses for all nuclear generating facilities as to which construction commenced after 1970. There is no conflict among the circuits on the question presented here; indeed, no other dispute involving this grandfather provision has reached the courts since its enactment in 1970. In sum, the holding below is narrow in scope, and it does not produce legal or other consequences which merit this Court's review of the decision.

I. The Court of Appeals correctly decided the case.

The decision below involves a focused question of construction of the Act. The Court of Appeals simply affirmed the NRC's ruling that the Act exempts licenses issued under Section 104b from the antitrust review provisions of Section 105c.[12] The decision below is based upon explicit statutory provisions adopted against the background of a legislative history which leaves no room for doubt that Congress understood and intended to do precisely what it did.

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[12] The standard applied by the D.C. Circuit in reviewing the NRC's construction of the statute was characterized in Judge McGowan's opinion as follows:

> In the instant case, where an agency is seeking to limit its own authority in an area not within its primary realm of responsibility, we must be especially vigilant to ensure that the agency is not shirking its statutory obligations (footnote omitted).

(Pet., A-17). Whether or not application of this review standard exceeded the bounds of proper judicial review, the Court's affirmance of the agency's construction in these circumstances is all the more significant.

The 1969 *Statesville* decision of the D.C. Circuit was a germinal force behind the 1970 revision of the Act. In a concurring opinion Judge Leventhal had characterized as the "key ruling" of *Statesville* "that in the event of an intervening [finding] of practical value, the statute requires that operating licenses be issued under section 103."[13] Congress, with *Statesville* before it, went on to abolish the "practical value" requirement. It then focused directly upon whether, as Judge Leventhal suggested, holders of extant licenses issued under Section 104b should be required to apply for operating licenses under Section 103. It deliberately adopted what the Court below characterized as a "grandfather clause,"[14] Section 102b, which provides that "any license hereafter issued for a . . . facility . . . , the construction or operation of which was licensed pursuant to subsection 104b, prior to enactment into law of this subsection, shall be issued under subsection 104b."

There can be no doubt that Congress, by adopting Section 102b, meant to exempt Section 104b licenses from the antitrust review provisions of the Act. This is clear from the report of the Joint Committee on Atomic Energy and, as the Court of Appeals noted, from the "tone of the hearings leading to enactment of the 1970 amendments."[15] Moreover, Congress si-

[13] 441 F.2d at 984 (Leventhal, J., concurring).

[14] Pet., A-21

[15] Pet., A-22. The decision below found especially persuasive the following language from the Joint Committee Report:

> [I]t would impose an unnecessary hardship on subsection 104b licensees to compel them to convert their permits to section 103 licenses; the matter of potential antitrust review of certain subsection 104 licenses is specifically dealt with in section [105c(3)], and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to section 103.

JOINT COMMITTEE ON ATOMIC ENERGY, REPORT TO ACCOMPANY H.R. 18679, H.R. REP. NO. 19-1470, 91st Cong. 2d Sess. 26-27 (1970), quoted in the decision below at Pet., A-21.

multaneously adopted a specific provision, Section 105c(3), 42 U.S.C. §2135(c)(3), subjecting certain applications under Section 104b, not including any of FPL's licenses, to antitrust review notwithstanding the "grandfather" clause.

Florida Cities' argument is based on Section 186a of the Act, 42 U.S.C. §2236, which allows the NRC to revoke a license for "conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application. . . ." The D.C. Circuit properly disposed of the argument as follows:

> The legislative history of the grandfather clause suggests to us that Congress, by creating an exemption from the general requirement of prelicensing antitrust review, deliberately chose to single out section 104(b) licensees, such as FP&L, for special treatment in obtaining operating licenses. Inasmuch as the "conditions revealed" clause of Section 186(a) is framed specifically in terms of the standards governing original license applications, we think it would be anomalous to interpret section 186(a) as authorizing postlicensing antitrust review under section 103 standards of the section 104(b) licenses at issue here, which, when reviewed as original license applications, were accorded by congressional mandate a special exemption from antitrust review. Accordingly, we reject Florida Cities' interpretation of the "conditions revealed" clause under which, for the purposes of license revocation, section 104(b) licenses would be treated as section 103 licenses.

Pet., A-22.

The intent of Congress to exempt this class of licenses from the Section 105c antitrust review is beyond reasonable dispute. Moreover, once the exemption is recognized, the validity of the D.C. Circuit's construction of Section 186a is plain.

It was because this interpretation of the Act was so compelling that the D.C. Circuit found it possible to avoid deciding an issue which it apparently believed to be more complex. The NRC had also denied the Florida Cities' request on a second ground—on the basis of its *South Texas* decision, which holds that the NRC's antitrust review functions are to be discharged in connection with the NRC's licensing functions and that the NRC is not vested with a continuing antitrust review or enforcement function.

In *South Texas*, the NRC carefully analyzed the Act, with emphasis on the interplay between the specific antitrust provisions of Section 105 as amended in 1970 and the general grant of authority in Section 186a. The NRC found Section 105 striking in its "specificity and completeness," in that it addresses the NRC's antitrust responsibilities in all foreseeable circumstances.[16] It examined the legislative history of Section 105 and its predecessors, focusing particularly on the legislative history surrounding the rewriting of Section 105c in 1970, and found overwhelming support for the view that the antitrust review functions of Section 105c were to be "prelicensing" or "anticipatory" in nature. 5 NRC at 1314 (Pet., A-67). The Commission noted that Section 186a was one of many examples of provisions which endow the NRC with "expansive health and safety jurisdiction, which continues through the lives of outstanding licenses," and concluded that, in circumstances where the generality of Section 186a could not be reconciled with the specificity of Section 105, "the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105."[17]

[16] 5 NRC at 1312 (Pet., A-64).

Obviously the question presented in this proceeding cannot be resolved favorably to Petitioners unless both of the independent grounds for the result reached by the court below and the Commission are determined to be in error. For this reason FPL respectfully submits that if this court decides to grant the writ it should address both of those grounds.

II. The decision below creates no exemption from operation of the antitrust laws.

Florida Cities imply that the decision below will permit violations of the antitrust laws to continue unchecked.[18] This argument is baseless. The Act itself provides that "[n]othing contained in this Act shall relieve any person from the operation of the [antitrust

[17] 5 NRC at 1316, 1317 (Pet., A-71, A-73). The Commission found it impossible to square the continuing antitrust jurisdiction argument with provisions of Section 105 which specify that the Commission may revoke a license on the basis of a court finding of violation of the antitrust laws "in the conduct of the licensed activity" (Section 105a), and which limit the circumstances in which a further antitrust review (additional to that conducted in connection with the construction permit application) can be conducted at the stage of an application for an operating license (Section 105c(2), 42 U.S.C. §2135(c)(2)). 5 NRC at 1317 (A-73).

[18] Pet., 18, 28.

laws]." Section 105a, 42 U.S.C. §2135(a). Florida Cities made the same argument to the D.C. Circuit, which disposed of it as follows:

> To so immunize the licenses at issue from post-licensing antitrust review under section 186(a) is not, as Florida Cities assert, to give FP&L a "carte blanche to use [its] facilities directly contrary to the antitrust laws." Section 105(a) not only provides that nothing in Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to section 105(b), has already forwarded Florida Cities' antitrust allegations to the Justice Department.

Pet., A-30-31.

This case does not involve any question of exempting persons or activities from operation of the antitrust laws.

III. The decision below does not significantly reduce the impact of the NRC's antitrust review activities.

The Petition suggests that the result below exempts "a major portion of the electric power industry" from NRC antitrust scrutiny (Pet., 10), and, to bolster this assertion, details the number and percentages of operating licenses issued under Section 104b as compared with Section 103. These statistics create a misimpression which belies the broad impact which the NRC antitrust review process has already had on the electric utility industry.

As of three years ago, the NRC estimated that companies responsible for 76% of the total kilowatt-hour electricity sales in the United States had been subjected to antitrust review under Section 105c.[19] This review is usually conducted at the construction permit stage of a license application. Act, Section 105c(1), 42 U.S.C. §2135(c)(1). Petitioners' statistics reach only plants actually licensed to operate, and ignore the many Section 103 license applications "in the pipeline" which have already been subject to antitrust review at the construction permit stage, but have not yet progressed to issuance of an operating license.

In practice, the NRC's antitrust reviews have included, in each instance, a wide-ranging evaluation of the relationship of the facility under consideration to the applicant's total system or power pool.[20] License conditions have been imposed, by agreement or order upon hearing, which are designed to remedy allegedly anticompetitive aspects of an applicant's electric operations in general.[21]

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[19] Testimony of Jerome Saltzman, Chief, Antitrust and Indemnity Group, Office of Nuclear Reactor Regulation, NRC, THE COMPETITION IMPROVEMENTS ACT OF 1975: HEARINGS BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE JUDICIARY COMMITTEE, S. 2028, 94th Cong., 1st Sess. 202 (1976).

[20] *See Louisiana Power & Light Co.* (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

[21] *See* D. PENN, J. DELANEY AND T. HONEYCUTT, THE U.S. NUCLEAR REGULATORY COMMISSION'S ANTITRUST REVIEW OF NUCLEAR POWER PLANTS: THE CONDITIONING OF LICENSES (1976), AND J. DELANEY, T. HONEYCUTT, AND M. MESSIER, ANTITRUST REVIEW OF NUCLEAR POWER PLANTS (1978), for a complete description of the results of all 105c antitrust reviews to date of publication, including a list of conditions imposed.

Thus, the effect of the NRC's and D.C. Circuit's decision below is relatively narrow. The great majority of utilities which hold licenses issued under Section 104b have subsequently submitted applications for licenses under Section 103, and have been, or are being, subjected to antitrust review in the context of those later applications. The exemption of the 104b licenses from NRC antitrust review affects only the arrangements associated with the exempted facilities, and, as to these, no exemption from operation of the antitrust laws is established or implied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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